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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY,
Debtor.

No. 359

PHILADELPHIA COMPANY, Petitioner,

vs.

JULES GUGGENHEIM, et al.

No. 360

PHILADELPHIA COMPANY, Petitioner,

vs.

CITY OF PITTSBURGH.

No. 361

PHILADELPHIA COMPANY, Petitioner,

vs.

HORACE BAKER and JOHN A. BEATTIE, Protection Committee for the Southern Traction Company 50 year First Mortgage and Collateral Trust 5% Gold Bonds.

No. 362

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

vs.

JULES GUGGENHEIM, et al.

No. 363

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

vs.

CITY OF PITTSBURGH.

No. 364

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

vs.

HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee, etc.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement.

In this bankruptcy reorganization pending since 1938, the petitions for certiorari are directed against a decision of the Circuit Court, which, acting on a petition of the City

of Pittsburgh, Pa., filed in the District Court in 1942, pierced the corporate veil of the various corporate units or divisions of the system of transportation in Pittsburgh, Pa., unified for approximately half a century. The petitioners contend that separate reorganization petitions (25 in number) should be filed by or against each underlier, which petitioners refuse to do, although that is within their power.

The petitioners are: Philadelphia Company, parent of debtor and of 36 divisions, called the 36 Philadelphia underliers; Monongahela, in which Philadelphia has a 24.7% interest stock, and Pittsburgh & Birmingham, with their subsidiaries. They are joined by Suburban, by Pittsburgh Incline and by South Side Passenger. Together they are called the guaranteed underliers, 9 in number.

The District Court said that "The system should be reorganized as a unit if it can legally be done", acknowledged that the "general purpose of the (City's) petition was to facilitate reorganization" and then dismissed the City's petition as recommended by the Special Master. The District Court's opinion is reported at 60 Fed. Supp. 600. Three separate appeals were taken to the Circuit Court:

No. 8964: Jules Guggenheim, et al. on behalf of ourselves and all similarly situated Public Security holders of debtor and of underliers.

No. 8967. City of Pittsburgh.

No. 8996. Horace F. Baker, et al., Debtor's Bondholder Committee.

The three appeals were heard together. The Circuit Court unanimously reversed; its opinion is reported at 155 Fed. (2) 477. No petition for rehearing was filed below.

W. D. George, a trustee of the debtor, petitioned the Circuit Court for clarification of its opinion. That petition,

restating arguments in the Circuit Court made by the petitioners and to this court was denied by the Circuit Court. The Transcript of Record accompanying the instant petitions does not contain our opposition to the petition for clarification in the Circuit Court.

The Circuit Court said (155 Fed. (2) 480, 482):

> "All the various corporate units or divisions, by whatever name they are designated, are welded to the operating company, Pittsburgh Railways (the debtor) * * *"
>
> "The community need for the operation of this public transportation system as an integrated unit is clear" (p. 480).
>
> "As we see the question, the issue is whether the demand of the facts is to control or whether obeisance must be made to the doctrine of separate corporate entities of these concerns, which from the business point of view, constitute one operation and one enterprise" (p. 482).
>
> "Since 1938 this system has been in the federal court and operated under trustees appointed by the court. This state of affairs cannot continue indefinitely and be utilized as a means of integration of a transportation system" (p. 480).

This, is but another chapter in the long history of vicissitudes of this unified transportation system.

This is the second time, the debtor, with consent of its parent, Philadelphia, invoked the shelter of the District Court for the Western District of Pennsylvania. An episode of this chapter, over six years old, is presented by this controversy begun in 1942 by the City's petition.

The Underliers.

1913: The Master's finding 391-416 treat with the manner in which the instant parent petitioner, Philadelphia Company, adjusted the deficit of debtor and underliers. New securities were created, some of which came into the hands of the investing public.

1918-1928: A consent equity receivership of debtor was instituted and withdrawn by Philadelphia Company (ff. 453-46).(a) Equity Receiver Fagan opposed lifting the receivership which had not effected any reorganization or any adjustment of the financial difficulties (f. 470) (R. 718). The other equity receiver did not oppose Philadelphia Company's application to terminate the receivership (f. 470) (R. 718). He was George, the debtor's present trustee (f. 470) (R. 718).

1938- ?: On May 10, 1938, debtor filed a voluntary petition for reorganization under Section 77B of the Bankruptcy Act (f. 1) (R. 613). On November 7, 1938, the Chandler Act was made applicable.

The Underliers.

Philadelphia Company's classification of the underliers is misleading (Phiadelphia petition, pp. 7-8). The underliers were *not* so classified by the Circuit Court (155 Fed. (2) 479-480).

Some of these 49 underliers are linked to the debtor by operating agreements that have been in effect since 1902. Others are tied by long term lease agreements (155 Fed. (2) 480).

36 Philadelphia underliers are directly or indirectly controlled by the common parent, Philadelphia Company,

(a) ("f" or "ff" followed by a numeral indicates the Master's finding having that number.)

through stock majorities at various levels and interlocking directorates of various degrees (155 Fed. (2) 480).

9 guaranteed underliers transferred their property and franchises to the Philadelphia underliers in 1902 under 900 year lease device in consideration of the guarantee of such leases by Philadelphia Company. The stock of these 9 guaranteed underliers is publicly controlled. Since the reorganization Philadelphia Company infiltration has occurred in Monongahela, Philadelphia Company owns 24.7% of the petitioner guaranteed underlier Monongahela and 6.6% of the petitioner guaranteed underlier Suburban.

4 underliers transferred their property and franchises in 1896 to one of Philadelphia underliers under 950 year lease device without any guaranty thereof. These 4 are called unguaranteed underliers.

The facts lay bare, that, the issue is not one of jurisdiction, but a contest between classes of creditors.

Pleadings.

The Trustee Reorganization Plan was systemwide. It provides that petitions for reorganization would be filed, not by all of the underlier companies but only by 25 companies (R. 614).

Philadelphia underliers answer to a rule obtained by Trustees, on the underliers and indenture trustees why each underlier should not file a separate petition (f. 484) (R. 617), provided by Philadelphia Company, stated the conditions under which the Philadelphia underliers would go along. The "third condition" related to the guaranteed underliers and required assurances satisfactory to Philadelphia Company preserving any defenses it might assert in mitiga-

tion of its annual liability of $516,422., exclusive of taxes under Philadelphia Company's guarantee (ff. 29, 32, 33, 489) (R. 618, 619, 725).

Subsequently in October, 1942, The City of Pittsburgh petitioned the District Court to exercise jurisdiction in bankruptcy reorganization over all underliers of the debtor —"to determine the rights and interests of all stockholders and as creditors thereof" (155 Fed. (2) 479).

The guaranteed underliers moved to dismiss the City's petition. Each separately stated that each (City Appendix pp. 92-98a incl.):

> "makes no claim in the proceedings on account of dismantling, destroying, abandoning or wearing out by use of trackage power and transmission equipment, car barns or street cars * * *
>
> "Philadelphia Company is a strong corporation financially and amply able to assume and perform its liability under said guarantee."

The unguaranteed underliers conditionally joined in the prayers of the City's petition. The conditions were that hearings be held for consideration of objections and amendments to the Reorganization Plan and to determine the relative substantation rights, priorities, liens, claims and interests of all creditors and stockholders of debtors and of underliers (ff. 891, 1018, 1078) (R. 804, 812, 832). No such hearings were held. Subsequently we instituted and have pending in the District Court, a proceeding to eliminate Philadelphia Company participation in the benefits of Reorganization Plan or to subordinate Philadelphia Company's asserted claims to the claim of Public Security holders (63

Fed. Supp. 7; 64 Fed. 231). If we are successful and the underlier separate corporate form is dishonored, every public security holder of debtor and of all underliers will be paid in full. The result would be full payment for the publicly held guaranteed underlier stock instead of being wiped out under the Trustees' Reorganization Plan.

Separate petitions for each underlier is impossible without Philadelphia Company's consent (see its answer to Trustee's petition page 5 supra).

If, similarly, statutory consolidation or statutory merger or any further conveyance or execution of any document were required from any of the underliers that, likewise, would be impossible without consent of the Philadelphia Company which obviously cannot be had.

No hearings have been held on the reorganization plan. It has not been submitted to security holders.

Question Presented.

Shall the demand of the facts control or must obeisance be made to the doctrine of the separate corporate entities of concerns which constitute one operation and one enterprise.

The Facts.

In 1902, the petitioner Philadelphia Company, brought about the unification of debtor and underliers (ff. 89, 95, 98, 100) (R. 639, 640) and welded them into one system in such fashion that a single route or a single passenger ride may involve the use of a number of the underlying companies' properties. Ascertainment of a proper apportionment of

the receipts of the system as a whole to the respective contributions of the underlying companies' properties is obviously almost an impossible task.

The unified transportation system functioned through a series of departments, all operated from one headquarters. The general departments which have been in existence for a great number of years, operate under the supervision of common general executives for debtor and all underliers (ff. 214) (R. 667). These general or joint departments include the Secretary's office, the Treasurer's office, the Accounting Department, the Adjustment Department, General Purchasing Agent, Director or Personnel and Advertising managers. The heads of these departments and certain of their employees are joint employees, in that they do not devote their time exclusively to the services of any one underlier or even one of Philadelphia Company's numerous enterprises (ff. 17, 214) (R. 667).

Four primary functions of the operating departments are on a system basis (ff. 221) (R. 669). Before the commencement of this reorganization, the Trustee Fitzgerald, formerly of the Philadelphia Company, was General Manager of this system. Under him were many departments and divisions, including those which have charge of routes, schedules and fares, operation of transportation, maintenance and renewals; accounting for revenues and expenses; all these functions have been performed on a system-wide basis in about the same manner since 1902 (ff. 221) (R. 669).

The Directors of Traffic Promotion in the Commercial Department has to do with the quantity and quality of services furnished, questions of routing and fare rates, extensions and alterations of service and such matters as the location of car stops and the erection of shelters. The heads

and staffs of the various divisions of the Commercial Department are not concerned with and do not know of the lines of demarcation between the underliers. In routing or scheduling or fixing fare zones, no weight is given to the original franchise locations of the underliers (ff. 222) (R. 669).

The group of men in charge of car house operations receive the schedules from the Traffic Promotion Division, assign men and cars to the routes on the schedule so prepared and send out the cars manned and ready for operation (ff. 229) (R. 669). Once these cars leave the barns, they are under the control of the superintendent of road operations (ff. 230) (R. 670).

The Chief Traffic Despatcher has charge of the entire operation of cars (ff. 237) (R. 671).

Maintenance and renewal of physical property of the System, consisting of overhead lines, cars, buildings, bridges and structures and under the charge of the Maintenance and Construction Departments which have 903 employees, exclusive of four supervisors, the General Superintendent and the head of three divisions (ff. 240) (R. 672).

There is just one shop in existence since 1902. It is at Homewood. It is here that the cars are inspected and repaired. The others were closed (ff. 242, 243, 244) (R. 672, 673).

> "The employees who maintain the property have no knowledge of the underlier groups and franchises, * * *" (244).
>
> "In general, in performing any of the functions of maintenance and operation of the system, the management pays no attention to the underlying companies, except in maintaining records of replacements, renewals and retirements" (ff. 248) (R. 674).

The Facts.

Fares are co-mingled. The Treasury Department * * * counts the amount of cash and tokens so received and reports such amounts by car houses to the auditors of receipts in the Accounting Departments, another such general department" (ff. 251). The Auditor of Receipts allocates to each route a portion of the cash and total fares collected at the car barn. "Thus, if one car house served ten routes and each route had collected 1/10 the total number of fares (regardless of what percentage was actually cash or in tokens), then each route would receive, on allocation, 10% of the total actual collections in the car house" (ff. 251) (R. 674).

"For general accounting purposes, however, all receipts from passenger revenues are lumped as one item * * *" (ff. 253) (R. 674).

"All expenditures are also accounted for on a system wide basis except certain capital expenditures for underliers * * *" (ff. 254) (R. 674).

"The method of accounting does not reflect separately the revenues or expenses of the underlying companies other than inclines. No accounting whatever is maintained of the receipts of the use or facility of any individual underlier than the inclines or of the expenses with respect to the sum of such facilities" (ff. 255) (R. 675).

SUMMARY OF ARGUMENT

I.

The realistic decision of the Circuit Court was plainly correct. The underliers' juridical conception was properly sacrificed for the reason that only thus can we overcome a perversion of the privilege to do business in the corporate form. Unity of life of debtor and of all underliers effected an equitable merger and an equitable consolidation in the common undertaking for a unified system of transportation. The Circuit Court has not departed from the accepted and usual course in holding that the District Court has jurisdiction of, and a Reorganization Plan may treat with, all underlier property, franchises and creditors (stockholders) thereof, without the filing or approving of separate reorganization petitions by or against underlier.

II.

There is no conflict of decisions on the point in issue.

III.

The questions presented by petitioner are not of sufficient importance to require review by this Court.

Argument.

I.

The realistic decision of the Circuit Court was plainly correct. The underliers' juridical conception was properly sacrificed for the reason that only thus can we overcome a pervision of the privilege to do business in

the corporate form. Unity of life of debtor and of all underliers effected an equitable merger and an equitable consolidation in the common undertaking for a unified system of transportation. The Circuit Court has not departed from the accepted and usual course in holding that the District Court has jurisdiction of, and a Reorganization Plan may treat with, all underlier property, franchises and creditors (stockholders) thereof, without the filing or approving of separate reorganization petitions by or against underlier.

A Reorganization Court is the one in which an enterprise may be brought with a view of having its difficulties ironed out.

In order to expedite reorganization, the Bankruptcy Act's broad and general provisions suffice to confer upon the District Court power appropriate to adjust property rights in a debtor's estate to prevent a breaking up of an established enterprise.

One trolley ride covers many different franchise segments belonging to ten underliers. Other routes use the franchises of thirteen different underliers.

The petitioners' contention is as unreal as that of the drayman's team with each horse insisting he is separately incorporated and is working under a written operating agreement to pull the leased truck.

Petitioner Philadelphia is blowing hot and cold. If the juridical conception of its 36 underliers is to be preserved, each of these 36 underliers should have been an appellee below and a petitioner here. Their battle is being waged by Philadelphia in its name and not in theirs. Thus, Philadelphia and its underliers acquiesce in the disregard of the separate form of the 36 Philadelphia underliers.

Argument.

In their motions to dismiss the City's petition, the guaranteed underliers petitioners Monongahela (in which Philadelphia has stock interest) and Pittsburgh & Birmingham acknowledged inability to repossess property contributed to the common undertaking for a unified system of transportation, and state they rely on the outstanding guarantee of Philadelphia Company (p. 6 supra). They do no business except that connected with the receiving of money derived from their connection with the unified system of transportation and the paying out of it to security holders. In the Circuit Court the guaranteed underlier says:

> "The Debtor has been engaged in the business of operating street railway properties. Monongahela and Birmingham have not been engaged in that business since 1902" (Monongahela brief, p. 70).

With formal logic, they say, they do all the realistic acts which a careful lawyer would advise a corporation to maintain its appearance of corporate individuality. Therefore, they conclude, that the separate corporate form must be honored. A difficulty with that conclusion is that "at times unity is ascribed to parts which at least for many purposes retain an independent life, for only thus can we overcome a perversion of the privileges to do business in the corporate form." Cardozo, J., in *Berkey* v. *Third Ave. Ry. Co.*, 244 N. Y. 84 at 85; reargument at 244 N. Y. 602. *Anderson* v. *Abbott*, 312 U. S. 349 and *Centmont* v. *Marsch*, 1 Cir., 68 Fed. (2) 460 pierced the corporate veil after the separate form had been honored in a former controversy. In the Berkey case, Judge Cardozo pointed out that the New York Public Service Commission Law at Section 54 does not allow one carrier to use the franchise of another. The Pennsyl-

vania statute is otherwise. The authority contained in the Pennsylvania Traction Act upon which petitioner relies does not require recognition of the form and disregard of the facts. The Pennsylvania statute is not an insulator.

The evidence, at bar, is clear that, except for outstanding Philadelphia guarantee (1) there has been a welding, assimilation, merger of the properties of the debtor and of underliers in a single enterprise. (2) The day to day business of debtor and of each underlier was not kept separate. (3) No formal barriers were maintained between the debtor and each underlier. (4) Individuals functioned indiscriminately for debtor and for all underliers. (5) Debtor and all underliers were represented at and since 1902 functioned as a single business enterprise with unity of life. (6) Each of the underliers surrendered its rights under its franchise to operate independent lines of transportation. (7) Each corporation in the common undertaking became an agent or instrumentality of the other to the debtor's unified system of transportation.

The Master's fact findings establish:

(a) complete unity of life of debtor and underliers for forty-three years—almost half a century;

(b) that the identity of the underliers was obliterated in 1902, since which time there has been this unified system of transportation of debtor and of underliers;

(c) that when remitted to the tests of honesty and justice, it is inequitable to disregard the substance and to honor the separate form;

(d) that sacrifice of the separate underliers' form is essential to defend and uphold the public interest and public policy;

(e) that control over all underliers was so complete, interference so obstructive that by the general rules of agency, each corporation in the system was an agent of the other in furtherance of the common enterprise—the unified system of transportation.

In the light of these facts the Courts will not permit themselves to be blinded or deceived by mere form.

Anderson v. *Abbott,* 321 U. S. 349, 88 L. ed. 793;
Davis v. *Alexander,* 269 U. S. 114, 70 L. ed. 186;
Southern Pacific v. *Lowe,* 247 U. S. 330, 62 L. ed. 1142;
U. S. v. *Reading Co.,* 253 U. S. 26, 64 L. ed. 760;
Chicago, etc. v. *Minn. Civic,* 247 U. S. 490, 62 L. ed. 1229;
Chicago, etc. v. *Des Moines,* 254 U. S. 196, 65 L. ed. 219;
U. S. v. *Delaware L. & W. R. Co.,* 238 U. S. 516;
Linn & Lane v. *U. S.,* 236 U. S. 574; 59 L. ed. 725;
U. S. v. *Lehigh Valley,* 220 U. S. 257, 55 L. ed. 458;
Southern Pac. v. *I. C. C.,* 219 U. S. 498, 55 L. ed. 310;
McCaskill v. *U. S.,* 216 U. S. 504, 54 L. ed. 590;
Lehigh Valley Railroad v. *Delachesa,* 2 Cir. 145, Fed. 617;
Lehigh v. *duPont,* 2 Cir. 128 Fed. 840.

The benefits of separate corporate existence may be destroyed in the absence of any stock ownership, upon application of the rules of agency (*New York Trust Co.* v. *Carpenter,* 6 Cir. 250 Fed. 688, 673; *Berkey* v. *Third Avenue,* 244 N. Y. 84, 95). Monongahela and Pittsburgh and Birmingham stress the time of their incorporation (p. 19).

Argument.

Prior incorporation is not an insulator in a group of corporations engaged in a common undertaking. (*Weiser* v. *Mursam,* 2 Cir. 127 Fed. (2) 344; *Darling* v. *Young,* 8 Cir. 121 Fed. (2) 112.)

The debtor was merely a facility, tool, part, segment, agency and instrumentality of each underlier in the operation of this comprehensive system of transportation (Compare *Linn & Lane* v. *U. S.,* 236 U. S. 574), precisely as if the debtor has "built, owned and operated" the underliers and their property (compare *Northern Securities* v. *U. S.,* 193 U. S., 197, 326; 48 L. ed. 679, 696).

It is sheer sophistry to argue, that, because each underlier is a separate legal entity, it is an independent carrier in the conduct of its business free from the other underliers in this system (*Chicago, etc.* v. *Des Moines,* 254 U. S. 196; *Chicago, etc.* v. *Minn.,* 247 U. S. 490). *Southern Pacific* v. *I. C. C.,* 219 U.S. 498, 521). Where, as here, the debtor and the underliers carried on their common venture through the medium of these underliers, it makes little difference what such underliers may be called.

While most of the cases in which the Courts have pierced the corporate veil involve a parent—subsidiary relationship —the rule is no different where affiliates are involved.

> *Weiser* v. *Mursam,* 2 Cir. 127 Fed. (2d) 344;
> *Darling* v. *Young,* 8 Cir. 121 Fed. (2d) 112;
> *Luckenbach* v. *Grace,* 4 Cir. 267 Fed. 676.

The same theories of jurisprudence—(1) Law of Agency, (2) Principles of Equity, and (3) Doctrines of Public Policy—test the armor of every entity in a group of corporations, even when the challenge is made in equity receivership or in bankruptcy proceedings.

Trustees System v. *Payne,* 3 Cir., 65 Fed. (2) 103;
Stone v. *Eacho,* 4 Cir. 127 Fed. (2) 284;
Simon v. *Chambers,* 5 Cir. 86 Fed. (2) 569;
Commerce Trust v. *Woodbury,* 8 Cir. 77 Fed. (2) 478 cert. denied 296 U. S. 614; 80 L. ed. 435;
Nelson v. *Guaranty Trust,* 9 Cir. 60 Fed. (2) 463;
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In re Eiler's Music House, 9 Cir. 270 Fed. 915, cert. denied, 257 U. S. 646;
In re Riegers, Kapner & Altmark, 157 Fed. 609;
In re Muncie Pulp Co., 2 Cir. 139 Fed. 546 cert. denied, sub non *Great Western* v. *Oppenheimer,* 202 U. S. 621; 50 L. ed. 1175.

As it was with these Siamese twins when they were well, so it must be now that they are ill.

Disregarding that Bankruptcy Courts pierce the corporate veil to reach and administer property, petitioners argue that the local Pennsylvania law requires the federal court to honor form and to disregard substance. None of the cases cited by petitioners sustain so absurd a contention.

The cases in the guaranteed underliers' brief, pages 23-25, do not support their contention that all property rights, treatment of leases and conveyances, in bankruptcy proceedings are to be determined by application of state law. These cases do no more than apply the bankruptcy rule, that, unless the state law is satisfied, a lien is invalid against the challenge of a trustee, and an innocent third party. That does not arise at bar. By piercing the corporate veil of the indenture (contracting) parties and their privies, a merger is effected. (*Cock* v. *Bailey,* 146 Pa. 328: 23 Atl. 370 dealt with a union of obligor and obligees).

Circuit Judge Goodrich, who was a member of the Circuit Court majority in *Corn Exchange* v. *Klander,* 129 Fed. (2) 894, said at bar:

"The Pennsylvania statutes do not, nor could they forbid or limit the jurisdiction of the federal bankruptcy court."

The unity of life of corporations engaged in a common enterprise, as here, effects a merger of them, which is not defeated by a lease between them giving to the one the operation and control of the other. In *Southern Pacific* v. *Lowe,* 247 U. S. 330, the Court struck down the armor of separate existence of lessor and lessee and said:

"While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being a part of the latter, acting merely as its agent, and subject in all things to its proper direction and control."

Allen v. *Philadelphia,* 3 Cir. 265 Fed. 817, stated "that leases for 900 years were, for operative purposes, to be treated as practical ownership equivalent to ownership by the operator". The preference for a lease instead of a statutory merger and consolidation might be termed psychological rather than procedural.

Seven states provide for an appraisal of the shares of dissenting stockholders of the lessor in precisely the same manner as that appraisal is provided for in statutory merger and consolidation.(b)

(b) Del. Rev. Code (1935) S 2178; Ind. Stat. Ann. (Burns 1935) S 55-2515; Md. Ann. Code (Flack 1935) Art. 23 S 221; N. H. Public Law (1942) Ch. 296 S 25; N. J. Rev. Stat. (1937) Title 48 Ch. 12 S 132; N. Y. R.R. Law S 161; Ohio General Code Ann. S 8810-8812.

In other states including Conn., Idaho, Illinois, Missouri, Montana and Virginia, there are provisions in the railroad statutes which might give a dissenter the right to an appraisal. In some instances where a railroad was organized under a special act, the act would provide for the dissenting shareholders, sometimes those of the lessee as well as those of the lessor. *Boston & M. R.R.* v. *Graham,* 179 Mass. 62; 60 N. E. 405 (1901).

Argument.

The essential idea in the leases and operating agreement for joinder of underliers with the debtor, like instruments in a merger and consolidation, is, that "lock, stock and barrel" went from all underliers to the debtor (*Mills* v. *Central R. R.*, 41 N. J. Equity 1). The Courts have held that a merger is effected by lease, in the absence of intercorporate stock ownership or control. (*The St. Paul M. M. Ry.* v. *Western Union*, 8 Cir. 118 Fed. 497; *Black* v. *St. Louis S. F. R. Co.*, 118 Mo. App. 198; 85 S. W. 96.) (None of the cases cited at pp. 21-26 of *Monongahela* brief are to the contrary.) Equity supplies the gaps between strict legal rules and the realism of modern business (*Helvering* v. *Metropolitan Edison*, 306 U. S. 522). An equitable merger and an equitable consolidation arises as a natural consequence of the maxim "equity looks upon that as done which ought to be done"(c). The parties to the leases understood that the underliers should go into a comatose condition.

A "court of equity may well look behind the corporate screen—" (*Westinghouse* v. *Allis Chalmers*, 176 Fed. 362, 367). "We are dealing here with realities not forms" (*Anderson* v. *Abbott*, 321 U. S. 349, 363; 88 L. ed. 793, 803). We are here interested in things not in looks. We must apply the motto: "*Esse quam videre*"; "to be rather than to seem."

Minnesota Mutual v. *McGirr*, 8 Cir. 263 Fed. 847, adjusted equities of parties to a transaction for which corporations should have been formed. The Court said (856):

> "The agreement between the parties is one that a court of equity would not and could not specifically enforce, but it is a case for equity to treat as having been done that which ought to have been done."

Monongahela and *Pittsburgh & Birmingham* say, page 18:

(c) *Emmons Coal* v. *Sir R. Ropner* (3 Cir.), 31 Fed. (2) 948 affirming 17 Fed. (2) 386, cert. denied 280 U. S. 577; 74 L. ed. 628 was an action for demurrage charges as a condition of releasing a cargo. The bond on which suit was brought was considered as given prior to release instead of after release.

> "The disregard of the corporate entities of Petitioners would not result in their properties being vested in the debtor; and the objective aimed at by the City, and, apparently by the Circuit Court, would not be attained."

As authority for this erroneous contention they cite *U. S.* v. *Milwaukee R. T. Co.*, 142 Fed. 247. That case does not so hold. In that case the United States applied to enjoin the payment of alleged rebates on freight, not to the shipping corporation, but to a transit company, as commissions for obtaining the business. Piercing the corporate veil, the Court held that the bill was not subject to demurrer in alleging that the Transit Company was controlled by the managing agent of the Shipping Corporation. The Court said, Sanborn, *J.* (p. 255):

> "If any rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Judge Sanborn was a member of the unanimous court which in *Wabash Ry.* v. *American Refrigerator Transit* (C. C. A. 8) 7 Fed. (2) 335 said at pages 343-344:

> "There is no particular divinity surrounding the term 'corporation'. The courts will look through the form to get at the real intent of the association of individuals or corporations forming the organization, and, if rights of third parties have not intervened, will give effect to the real purpose of the organization in order to promote square dealing and effectuate justice."

Argument.

It is idle, for petitioners to say that disregard of the separate corporate form will not attain the objectives aimed at by the Circuit Court and by the City. Piercing the corporate veil effects a merger (see pp. 17-19 supra).

Quite apart from the fact that the Court did not test the armor of the juridical conception in *Second Ave. Co.* v. *United Traction Co.*—Appeal of *Pittsburgh Railways,* 328 Pa. 257; 195 Atl. 25 (*Monongahela Petition* p. 22) and that case was decided shortly before the present reorganization was begun, that case, as a precedent, is impaired by the fact that was a family controversy of Philadelphia subsidiaries and cannot be considered as a vigorously contested adversary litigation.

In *Monongahela Street Railway Co.* v. *Philadelphia Company and Consolidated Traction Co.,* 350 Pa. 603; 39 Atl. (2) 902 at page 912: "Monongahela—filed a bill of complaint against Philadelphia for specific performance of the covenant by Consolidated in the agreement of lease". "As to the guaranty of Philadelphia with respect to the covenant to pay taxes; Philadelphia being a compensated surety any doubt as to the meaning of the guaranties is to be resolved against it" (916). That Court was not required and did not attempt to determine the effect of the instrument between the underliers.

If the separate corporate form is to be honored, then this system must break up contrary to the public convenience contemplated by the Pennsylvania Public Utility Commission. In *Palmer* v. *Massachusetts,* 308 U. S. 79, this Court declined to permit destruction of a public convenience that had approval of the state regulatory body.

If we look to the spirit rather than to the letter, if we regard the substance rather than the form, if we fix the judi-

cial eye on essentials rather than incidentals, the debtor and the underliers are one, without need for any further instruments or proceedings.

As a result of this coalescence of this unity of life for about 50 years, it is as impossible to resurrect each underlier as it is to make again sand, stone, pebbles, cement and water out of concrete. Each lost its separate identity.

The petitioners' arguments that the underliers are still the owners of the leased property rests on the legal construction of the leases and operating agreements, and ignores the equitable consequence of the merger and the consolidation that has taken place.

The power of a Bankruptcy Court is not a rigid thing narrowly circumscribed by the Bankruptcy Statute (*Continental Ill. Nat. Bank & Trust Co.* v. *Chicago R. R.*, 294 U. S. 648).

The Bankruptcy Act should be liberally construed to accomplish the purpose for which it was enacted (*Wright* v. *Union Central*, 311 U. S. 273).

The facts call for treatment of debtor and underliers as one entity, with unity of life. The Circuit Court was plainly correct in concluding that, with the exception of Philadelphia Company's guarantee, all of the underliers property should be treated as if it were the property of the debtor without any further conveyance, or any statory merger or consolidation and that the public security holders of the underliers should be treated as creditors of the debtor.

"If the judicial power is helpless—then indeed it has become a handy implement of high finance" (*Anderson* v. *Abbott*, 321 U. S. 349 at p. 366.)

II.

There is no conflict of decisions on the point in issue.

III.

The questions presented by petitioner are not of sufficient importance to require review by this Court.

The extent, if any, to which Philadelphia shall benefit in a fair and feasable reorganization plan, and how Philadelphia shall clear up its guarantee is not of importance to burden this Court at this time.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari prayed for should be denied.

Respectfully submitted,

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